No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE JEWS FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Jews for Religious Liberty ("JFRL") is an unincorporated, cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JFRL's members have written extensively on the role of religion in public life. Representing members of the legal profession and adherents of a minority religion, JFRL has a strong interest in ensuring that the rights of adherents of minority religions are protected and that First Amendment jurisprudence enables the flourishing of diverse religious viewpoints and practices in the United States.

Amicus maintains that while the Ninth Circuit's holding would curtail every American's freedom of speech, it will uniquely threaten practitioners of minority religions such as Orthodox Judaism. Amicus is dedicated to protecting the religious liberty of its co-religionists as well as adherents of other religions nationwide.

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have given consent to the filing of this amicus brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amicus or their counsel has made such a monetary contribution.

SUMMARY OF ARGUMENT

The Orthodox Jewish community in America maintains various organizations intended to facilitate adherents' incorporation of Jewish law and tradition into every facet of their personal and communal lives. From hospices to arbitration panels, from marriage counseling to drug rehabilitation, the Jewish community offers a comprehensive slate of services that cater to Orthodox Jews' needs as individuals, as Americans, and as practicing Jews. To fulfill their goals, these institutions must freely communicate with adherents. The message that these organizations communicate—that it is possible to flourish as an Orthodox Jew within the larger American society—is an essential part of their mission.

The adoption of a rule that allows the government to regularly force such groups to convey messages contrary to their beliefs would undermine these organizations by preventing them from clearly communicating their own messages. As adherents of a minority religion, Orthodox Jews have a particularly strong need to convey their unadulterated messages. Otherwise, they risk the dissolution and assimilation of their coherent and vibrant community into the larger secular society.

This risk is even greater if, as here, a governmental entity targets unpopular or minority religious ideas. Orthodox Jews are a minority within a minority in America, and, as such, many of their practices are unknown or unappreciated. Laws targeting speech promoting practices such as circumcision or ritual

slaughter would make it significantly more difficult for Orthodox Jews to flourish in America.

California's Reproductive FACT Act (the "Act") targets organizations that express pro-life sentiments, including those that do so for religious reasons. If the Ninth Circuit's judgment in *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), becomes the law of the land, governmental entities will have license to compel religious organizations to contradict their intended messages without demonstrating that doing so is the least restrictive means of furthering a compelling government interest. If that occurs, all religious groups will lose an important Constitutional protection that they have heretofore enjoyed, but unpopular and minority religions will be particularly vulnerable to purposeful targeting by the state.[2] Reversing the decision below will ensure that these groups are afforded the full protection of the First Amendment, and will require the state to demonstrate a compelling need before co-opting religious individuals and organizations to spread a governmental message contrary to their deeply held religious beliefs.

Orthodox Jews and other minority religions depend on the freedom of speech guaranteed by the First Amendment. This Court should reaffirm that those protections cannot be lightly removed by governmental actors pursuing their own ideas of progress.

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[2] Such laws could also be enacted regarding non-religious, minority and unpopular views as well. *See* California Reproductive FACT Act, Assembly Committee on Health, Analysis of Assembly Bill No. 775 (Apr. 14, 2015) at 5 (opposing bill because "if enacted, it could set a precedent for many other businesses that are not liked or appreciated by one group in society").

ARGUMENT

I. A Legal Regime Authorizing Governmental Entities to Compel Orthodox Jewish Organizations to Communicate Messages Contrary to Their Objectives and Beliefs Will Diminish Orthodox Jews' Ability to Maintain a Vibrant and Coherent Community Within the Larger American Society.

Orthodox Jewish communal organizations have played a vital role in allowing Jews to maintain successful diaspora communities for centuries. Strong Jewish communal organizations help Jews to both thrive as members of their larger societies and maintain their Jewish identities and commitments. The Ninth Circuit's decision below threatens the efficacy of these organizations by allowing governmental entities, without first demonstrating a compelling need, to co-opt them for governmental purposes at odds with their communal goals.

A. The Act at Issue in This Case is Particularly Offensive to the First Amendment and Dangerous for the Orthodox Jewish Community Because It Singles Out a Minority View for Disparate Treatment.

As this court has noted, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Recently, this Court has reaffirmed the First Amendment's protection of views expressed by

unpopular religious minorities. In *Snyder v. Phelps*, this Court held the First Amendment protects a church's message even though it is highly unpopular and "many Americans might feel [the message is flawed]." 562 U.S. 443, 460 (2011). Indeed, such protection was afforded to the speech at issue, even though the Court considered it "tortious." *Id.* at 451 n.2. This Court reiterated that protection in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that despite the recognition of a constitutional right to same-sex marriage, "religions, and those who adhere to religious doctrines may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned").

The Ninth Circuit's decision stands in stark contrast to this Court's decisions reaffirming that the freedom of speech extends to all Americans—especially to those speakers expressing controversial ideas or advocating for unpopular causes.

California's Legislature transparently targeted "facilities that offer pregnancy-related services and are commonly affiliated with or operated by organizations whose stated goal is to prevent women from accessing abortions." *See* California Reproductive FACT Act, Assembly Committee on Judiciary, Analysis of Assembly Bill No. 775 (Apr. 28, 2015) at 5. The Act's selective targeting, it explained, represented a "forward-thinking program," one that is "in the best interest of the state, patients and providers." *Id.* at 4–5. If such explicit targeting of a particular religious view does not constitute viewpoint discrimination and is not subject to strict scrutiny, the Americans most in need of the First Amendment's assurances will be

stripped of those protections. Popular opinions of politically powerful groups are unlikely to need the First Amendment's protections to avoid censorship. *See* Laura W. Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 Colum. L. Rev. 984, 1030 (1994) ("The fear of majoritarian bias in adjudication and legislation has shaped much First Amendment doctrine. The fear derives from a perceived tendency of democratic forces ... to permit only popular opinion and to suppress points of view that are unconventional or threaten dominant values.").

While the Ninth Circuit's approach to the question is of concern to all faiths, it is of special concern to Orthodox Jews, who are a minority within a minority, and whose neighbors do not always know, understand, or approve of their beliefs. Orthodox Jewish Americans are more likely than most to be negatively impacted by "forward-thinking" laws aimed at suppressing unpopular religious ideas. Speech promoting practices like circumcision and ritual slaughter that are not well-known or understood is particularly likely to be targeted by "forward-thinking" governments. To prevent such discriminatory targeting of Orthodox Jewish speech, the Supreme Court should reverse the Ninth Circuit and reaffirm the notion that government entities may never target speech or speakers simply because they disagree with the message being conveyed.

B. Laws Compelling Orthodox Jewish Organizations to Convery Messages Contrary to Their Purposes Would Pose a Threat to the American Orthodox Jewish Community's Continuity and Vibrancy, Even Absent the Impermissible Animus-Based Targeting.

It is a fundamental tenet of Orthodox Judaism that all members of the Jewish people are guarantors for one another,[3] and each Jew is therefore considered partially responsible for the spiritual well-being of his fellow Jews. As a result, Orthodox Judaism places a premium on the concept of community and the obligation to assist one's neighbors. In the United States, this religious objective is fulfilled, in part, by the community's creation of and involvement in various organizations, which assist members of the community in leading their lives in accordance with Jewish law and tradition. These organizations play an essential role in allowing Orthodox Jews to thrive as both Jews and Americans.

Laws like the Act would obscure these organizations' messages and undermine their ability to sustain the Jewish community. A few examples are sufficient to illustrate the well-founded nature of this concern.

- *Social Services and Counseling*: The Orthodox Jewish community supports a number of social service organizations that provide counseling to troubled youth who struggle with alcohol or substance

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[3] Babylonian Talmud, Shevuot 39a

abuse. These organizations include Madraigos, Chabad Residential Treatment Center, Jewish Recovery Center, and Behavioral Crossroads's Kosher Recovery Program. *See, e.g.*, *Chabad Residential Treatment Center*, CHABADREHAB.COM (last visited Jan. 11, 2018). These organizations specialize in offering professional services in a religious-friendly environment that is geared towards the community's specific needs. *Id.* (noting that the program "is based on the traditional values of the Jewish Torah").

Similarly, many Orthodox Jewish mental health professionals and marriage counselors provide services sensitive to the community's religious needs and ideals.

The *raison d'etre* of these organizations and professionals is to send the message that people's needs—including serious needs such as substance abuse counseling—can be handled in an environment friendly to Orthodox Judaism. As such, many of these institutions utilize Jewish values to improve the effectiveness of their counseling. They also offer clients and patients the opportunity to benefit from top-quality care without compromising strict adherence to Orthodox Jewish standards. If such organizations and practitioners were required to inform their patients or customers of alternative secular options at the very outset of their treatment, it would obscure this message and send a contrary one: that processes infused with Jewish ideals are somehow incapable of solving these types of problems.

- *Arbitration of Civil Disputes*: The Orthodox Jewish community strives to resolve civil disputes without resorting to litigation. When disputes escalate beyond individuals' ability to reach a resolution,

many Orthodox Jews deem it obligatory to utilize a *beth din* (a Jewish religious court) to attempt, in the first instance, to arbitrate certain civil cases according to the Jewish law and tradition. *See* Menachem Posner, *What is a Beit Din*, https://goo.gl/N9cTZ7, CHABAD.ORG, (last visited Jan. 11, 2018).

One of the purposes of requiring Jewish litigants to begin a case in Jewish arbitration is to reinforce the notion that the Jewish people are part of a religious community. Additionally, the requirement sends a message to the community that Jewish law is alive and relevant to Jews' daily lives. A statute requiring the *beth din* to begin the process by alerting litigants that they can simply bypass the religious courts and proceed to litigation would undercut the very purpose of having a *beth din* and suggest that the Jewish law is unimportant and inadequate for modern American problems.

- *Hospice Care*: Jewish tradition extols the virtue of caring for the ill and dying. Orthodox Jews adhere to detailed laws informed by the belief in the sanctity of human life and the obligation to provide all people with life's basic needs. As such, hospice care in the Orthodox Jewish community operates pursuant to strict religious standards that place a premium on saving even a single life for even a short amount of time.[4] There are therefore Jewish hospice and nursing home programs that provide care with sensitivity to the needs of Orthodox Jewish patients. *The YU/Riets*

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[4] *See* Moses Maimonides, *Code of Jewish Law and Ethics, Laws of Murder and Protecting Life*, Chapter 2, Law 7; Rabbi Immanuel Jakobovits, *Jewish Medical Ethics* 123-25 (New York: Bloch, 1959).

End-of-Life Care Halachic Advisory Program, YU.EDU, https://goo.gl/bYmvXy (last visited Jan. 11, 2018).

Jewish hospice programs demonstrate that the Jewish community is capable of caring for its adherents even in the most difficult and trying of times, and that Jewish law is relevant from the moment a Jewish person is born until the moment he dies. If such hospice care providers were required to inform patients of alternative hospice options, their message would be lost.

In each of the foregoing examples, the Jewish community would be weakened if communal organizations were compelled to communicate messages inconsistent with Jewish law and tradition. The Constitution requires any law that produces such a result to satisfy strict scrutiny.

The First Amendment is intended to protect a vibrant and diverse marketplace of ideas. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, (2014). The Ninth Circuit's decision, which allows governments, without satisfying strict scrutiny, to compel organizations to convey governmental messages that might fatally undercut their own messages, places that marketplace in mortal danger. This Court should therefore reverse that decision.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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